

Nadler Chairs Hearing on Critical State Secrets Legislation

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WASHINGTON, D.C. – Today, Congressman Jerrold Nadler (D-NY), chair of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, chaired a legislative hearing on H. R. 984, the State Secret Protection Act of 2009. This bipartisan bill, co-sponsored by Reps. Thomas Petri (R-WI), House Judiciary Chairman John Conyers, Jr. (D-MI), Bill Delahunt (D-MA) and Zoe Lofgren (D-CA), would ensure meaningful judicial review of the state secrets privilege and prevent premature dismissal of claims, while ensuring protection of national security interests.

Among the expert witnesses were: the Honorable Patricia Wald, retired Chief Judge of U.S. Court of Appeals for the District of Columbia; the Honorable Asa Hutchinson, Senior Partner at AH Law Group and former Congressman for the 3rd District of Arkansas; Ben Wizner, Staff Attorney for the Security Project of the ACLU; and, Andrew Grossman, Policy Analyst at the Heritage Foundation

“Recent experience has demonstrated the destructive impact that sweeping claims of privilege and secrecy have had on our nation,” said Rep. Nadler. “The courts, and the Congress, have a duty to review this administration’s, or any administration’s, claims of state secrets privilege and to determine whether or not those claims are well founded. Particularly when the government itself is a party, the court cannot allow it to become the final arbiter of its own case. No administration should be able to act as its own judge or to sidestep our system of checks and balances.”

The state secrets privilege allows the government to withhold evidence in litigation if its disclosure would harm national security. The purpose of the privilege is to protect legitimate state secrets; but if not properly policed, it can be abused to conceal embarrassing or unlawful conduct whose disclosure poses no genuine threat to national security.

In the past few years, the Bush administration’s use of the privilege to dismiss cases challenging the most troubling aspects of its war on terror – including rendition, torture and warrantless wiretapping – have highlighted the need to ensure that judges do not simply accept a government’s secrecy claim at face value. More recently, the Obama administration has adopted a similarly expansive view of the state secret privilege in cases challenging rendition to torture and warrantless surveillance of U.S. citizens, urging the courts to dismiss these cases outright without even allowing the parties to conduct non-privileged discovery. This underlines the continued need for clear guidance on proper court handling of state secret claims.

The following is the text of Rep. Nadler’s opening statement, as prepared:

“Today, the Subcommittee examines legislation I have introduced along with Rep. Tom Petri, the distinguished Chairman of the full committee, and with several other members of this Committee, that would codify uniform standards for dealing with claims of state secrets privilege by the government in civil litigation.

“In the last Congress, we had an oversight hearing on the state secrets privilege, and a hearing on this legislation. It was reported favorably to the full committee.

“Our experience has demonstrated the destructive impact that sweeping claims of privilege and secrecy have had on our nation. In order for the rule of law to have any meaning, individual liberties and rights must be enforceable in our courts. History shows that rights without remedies – and that’s what we will have if the executive can have any case dismissed on the mere assertion of state secrets – cease to be rights. Separation-of-powers concerns are at their highest with regard to secret executive branch conduct, and the government simply cannot be allowed to hide

behind unexamined claims of secrecy.

“As the Court noted in the Jeppesen case, the executive cannot be the judge of its own conduct. That is the definition of tyranny, and we cannot allow it in this country.

“Yet claims of secrecy have been used to conceal matters from Congress, even though members have the security clearance necessary to be briefed in an appropriately secure setting. That has been the case with respect to the use of torture, illegal spying on Americans, and other matters of tremendous national importance.

“This same pattern of resorting to extravagant state secrets claims has also been evident in the courts. While the Bush administration did not invent the use of the state secrets privilege to conceal its wrongdoing, it certainly perfected the art. The state secrets privilege has been abused by prior administrations to protect officials who have behaved illegally or improperly, rather than to protect the safety and security of the nation.

“The landmark case in the field, U.S. v. Reynolds, is a perfect case in point. The widows of three civilian engineers sued the government for negligence stemming from a fatal air crash. The government refused to produce the accident report — even refusing to provide it to the court to review — claiming it would reveal sensitive state secrets that would endanger national security. The Supreme Court concurred without ever looking behind the government’s unsupported assertion that national security was involved.

“In fact, a half century later, the report was found on line by the daughter of one of the engineers, and it clearly could have been made available in a form that would have enabled these families to vindicate their rights in court. It did, however, reveal that the crash was caused by government negligence.

“Protecting the government from embarrassment and civil liability, not protecting national security, was the real reason for withholding the accident report. Yet these families were denied justice because the Supreme Court never looked behind the government’s claim to determine whether it was valid.

“Similarly, in the Pentagon Papers case, then-Solicitor General Erwin Griswold warned the Supreme Court that publication of the information would pose a grave and immediate danger to national security. Eighteen years later, he acknowledged that he had never seen “any trace of a threat to the national security” from the publication of the information and admitted that “the principal concern ... is not with national security, but rather with governmental embarrassment of one sort or another.”

“It is important to protect national security, and sometimes our courts have to balance the need for individual justice with national security considerations. Congress has, in the past, balanced these important, albeit sometimes competing demands. In the criminal context, we enacted the Classified Information Procedures Act. In FISA, we set out procedures for the courts to examine sensitive materials. Through FOIA, we sought to limit any withholding of information from the public, whom the government is supposed to serve.

“We can, and should, do the same in civil cases. Our system of government, and our legal system, has never relied on taking assurances at face value. The courts, and the Congress, have a duty to look behind what this administration, or any administration, says to determine whether or not those assurances are well founded.

“Presidents and other government officials have been known not to tell the truth, especially when it is in their

interest to conceal something. The founders of this nation knew that there needed to be checks on each branch of the government to prevent such abuses from taking place.

“Courts have a duty to protect national security secrets, but they also have a duty to make an independent judgment as to whether state secrets claims have any merit. When the government itself is a party, the court cannot allow it to become the final arbiter of its own case.

“The purpose of this legislation is to ensure that the correct balance is struck.

“I would just add that I am extremely disappointed that the Department of Justice has declined to provide a witness to discuss this very important issue. I have met with the Attorney General, and I understand that a review is currently under way. Nonetheless, the Department continues to go into court and take positions that are remarkably similar to positions taken by the Bush administration.

While I greatly appreciate the Attorney General’s willingness to work with us, I believe that it should be possible to send someone to provide us with the Administration’s views, and answer our questions, to the extent that they are able. I hope that this not a sign of things to come.

“I look forward to the testimony of our witnesses.”